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Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:

Koukouvelis, K. (2008). Neutrality, Religious Symbols and the Question of a European Public Sphere. *Politics in Central Europe*, 4(2), 41-60. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-63191>

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Neutrality, Religious Symbols and the Question of a European Public Sphere¹

Kostas Koukouzelis

Abstract: *In the last two decades there has been an on-going, fierce debate in members and candidate members of the European Union concerning the use of religious symbols in the public sphere. The exemplary case is, without doubt, the case of the Muslim headscarves, a case that emerged particularly in France and Germany, but also in other places, such as the Netherlands and Turkey. Taking stock mainly from the French example we shall focus on the main normative justification of the prohibition of religious symbols, that is, the principle of laïcité conceived as state neutrality. The latter should not be interpreted as secularism, that is, a strict separation between private and public space. Laïcité as neutrality should neither be seen in a moralistic way nor privatize religious identity. Part II will examine the jurisprudence of the issue commenting on cases recently adjudicated by the ECtHR. The Court, unfortunately, recognizes a ‘margin of appreciation’ to member states, when the prohibition of religious symbols constitutes a form of both direct and indirect discrimination. Finally, in part III, we will argue that neutrality should be interpreted as real not formal equality towards both religious and non-religious beliefs. Freedom of conscience is intrinsically connected to its public manifestation, which makes the public sphere constitutive of subjectivity. This cuts across the private/public divide and resists the insistence of multiculturalists on collective rights. The task of instituting a European public sphere is a struggle for equality not for common cultural identity.*

Keywords: *difference, neutrality, headscarves, religious symbols, public sphere, Europe*

I. Common values and religious symbols

The European Union derives its strength from common values of democracy and human rights, which rally its people, and has preserved the diversity of cultures and languages and the traditions which make it what it is.

The Schuman Declaration (Fontaine, 2000:7)

¹ Many thanks to Panayiotis Flessas, Dimitris Kyritsis, Leda Lakka and an anonymous referee of this journal for helpful comments on an earlier draft of this article.

The passage just quoted describes in a nutshell one of the fundamental common assumptions about the EU's derivation of its moral and political legitimacy. Its references and use of notions like 'common', 'values', 'democracy', 'human rights' for example is characteristic of a certain way of evaluating the project of European 'integration'. Nevertheless, what is missing from this formulation is whether what is described above as a plane of common presuppositions has *already* taken place or *is about* to be materialized as a task. In other words, there is an inherent ambiguity about whether what is described is indeed a *fact* – the *reality* of common values of democracy and human rights – or a *value* – the same common values waiting to be *realized*. This ambiguity is no mere theoretical pretension of the demand for more theory, but it is rather irreducibly *constitutive* of the European project. There are significant and diverse implications, which follow from whichever of the two horns of this dilemma one ascribes to.

The problem of religious symbols in general and the affair of the Muslim headscarves in particular, as presented in most European countries, although particularly in France, provides us with an example of conflictual cultural identity politics, and the issues deployed in it – the overlapping representations of gender, class, ethnicity and race, and mostly religious identity in the nation-state context – are crucial in the context of the ambiguity of the European project we identified above. The recently imposed complete ban of religious symbols in French public schools puts the issue of equality, difference and identity under renewed pressure. While traditional countries of destination regarding immigration, like the US and Canada, have been dealing with cultural clashes and accommodation of 'non-western' religions for decades, rising immigrant populations pose a new dilemma for European countries, forcing society and politicians to rethink their established cultural identity. Multiculturalism puts the stakes for a coherent and fair liberal politics extremely high, not the least because European liberal democracies have to take a stance on how they treat the emergence of new fundamentalisms and whether they compromise liberty or perhaps deepen their conception of what liberalism truly demands.²

Neutrality has been the standard answer of the liberal, democratic state to religious and cultural difference. Its classic justification can be found in J. S. Mill's thesis that power must not be exercised over people for non-neutral reasons (Mill 1962), and much earlier in John Locke's plea for toleration and his insistence that the state must stay clear of the so-called care of the souls (Locke 1983 [1689]).

² Historically speaking, it is important to point out here that contemporary multiculturalism is a phase in the return of post-colonial people to the metropolis. It is the meeting point of the normative history of the West and the counter-history of its realization; see Bhabha 1990: 218 and Emmer 1993.

It also constitutes a fundamental thesis in contemporary liberal legal and political philosophy, which broadly shares the view that ‘a neutral state is one that deals *impartially* with its citizens and remains neutral on the issue of what sort of lives they should lead’ [Jones 1989, 9].³ Nevertheless, the interesting thing is that neutrality is equally claimed by both the proponents and the opponents of the ban of religious symbols in European countries.⁴ Such a thing makes us realize that there is an important element of truth regarding the question of the character and nature of what is actually ‘common’ in Europe.

However, the argument of this article can only be described as a modest and primarily a negative one. If the justification of the French law on the ban of *all* religious symbols, including Muslim headscarves, and other European states’ treatment of the issue is based on some conception of neutrality, then it would be an important task for us to clarify what neutrality is not and what it should not be. The confusion on the issue might stem from neutrality’s Janus-faced nature: it may be a device of inclusion for minorities who understand neutrality as the equal right to pursue their way of life as they see fit; but it may also be a device for exclusion, via strengthening the necessarily particular boundaries and sense of collective self of the dominant group. Accordingly, in the next part (II), we will focus on the French case trying to give a brief account of the French notion of *laïcité* and its interpretation as strict separation between state and church (secularism). This particular interpretation will be linked to a certain, i.e. perfectionist, interpretation of it, which, allegedly, tries to emancipate young students. Furthermore, we will also consider a libertarian interpretation of *laïcité*, that is, conceived as privatization of religious identity. Part III will provide us with an overview of the problematic and conflicting treatment of religious symbols by European countries and mostly by the European Court of Human Rights [ECtHR]. In the end, we shall conclude that should neutrality be a fundamental value embodied in the *European Convention of Human Rights* [ECHR], its interpretation has to (a) be unified as a core common value in the EU and (b) take the form of a specific conception of equality appropriate in a public sphere that is constitutive of subjectivity.

³ State neutrality is advocated by contemporary liberal thinkers. Rawls especially places the foundation of state neutrality on the key distinction between the ‘right’ and the ‘good’ prioritizing the former in relation to the latter. Briefly, the ‘good’ responds to the question ‘how should we live whatever the circumstances?’, whereas the ‘right’ responds to the prior and independent question ‘under what circumstances is it possible to live as we should?’ Rawls subscribes then to ‘neutrality of aim or justification’, which is the claim that the justification (rather than the effect) of state action has to be neutral (Rawls 1988: 260–264). For more on liberal neutrality see among others Goodin and Reeve 1989.

⁴ The principles of state neutrality together with equality of respect and freedom of religion form constitutive elements of the interpretation of *laïcité* as the Stasi Commission reported to the French National Assembly when it justified its proposal for the law banning all religious symbols from public sphere.

*On the ban of headscarves in French public schools:
laïcité and neutrality*

After several years of indecisive mutterings, during which school principals were keeping the courts busy by expelling scarf-wearing girls, 9/11 put the matter in more pressing terms, with the wearing of the headscarves being depicted as an imminent threat to the French Republic, an islamization of its education.⁵ All parties, with very few exceptions, coincided politically on the same position: keeping young Muslim women out of public school *because* of the cultural (religious) distinctiveness of their dress. The immediate justification was that wearing headscarves challenges the national principle of secular education and French citizenship. Only the absolute rule of *laïcité*, by which the young women should abide, could save these women from the tyranny of their fathers! As a consequence of that, and after much controversy, the French National Assembly passed legislation, which prohibits all symbols and clothing that draw attention to [*manifestent ostensiblement*] the religious affiliations of pupils in the public primary, middle and high schools.⁶ This included big Christian crosses and Jewish skullcaps (kippas).

In France, *laïcité*, a principle that has a long and revealing tradition that dates back to the years of the Revolution, has its roots back in a 1905 law that institutes officially the separation between state and church and remains active until the 80s as a fundamental constitutional principle (Troper 2000: 1267). Generally speaking, the meaning of the separation between state and religion is that the state has to be *laïc*, that is, neutral in a very specific way. The principle of *laïcité* takes the meaning of a strict separation between state and church (Haarcher 2004: 5). This conception of the principle is translated into a polemic attitude against any religion. It becomes then an anti-religious doctrine and *laïcité* equals in that sense secularization, which transforms the strict separation of state and church into state's own 'combat neutrality' (Poulter 1997: 50).⁷ Thus, whereas some young Muslims thought that their freedom of religious practice, indeed their religious identity, should be respected in its public manifestation, the French state banned exactly this 'public manifestation'

⁵ Nevertheless, the Conseil d'État's decision of 27 November 1989 annulled the exclusion of three Muslim girls arguing in favor of a 'liberal' conception of neutrality: neutrality for students means 'freedom of conscience', which allows them to express their religious affiliations even in the classroom. The carrying of the veil was, according to the court, an expression of fundamental religious liberties and goes hand in hand with the equality of all religions (William 1991). The judicial emphasis on the rights of students is of pivotal importance as it was abandoned, later on, in the adoption of the law by the 'republican' conception of neutrality.

⁶ No. 2004-228.

⁷ Seyla Benhabib, for example, seems to share such a view when she defines *laïcité* as 'public and manifest neutrality of the state toward all kinds of religious practices, institutionalized through a vigilant removal of sectarian religious symbols, signs, icons, and items of clothing from official public spheres' (Benhabib 2004: chapter 5); on the history of *laïcité* in France see Baubérot 2003.

on grounds that this goes against the French commitment to the principle of state neutrality in the sense of strict separation or ‘combat neutrality’. Since the French revolution religious freedom becomes one of the most important legally protected rights, but the movement from the religious to the nation-state left in place a one-way, assimilative politics of identity.

To be clear, the normative justifications of this legislative initiative, which are at the same time interpretations of the principle of *laïcité*, were mainly two: (a) the ban on all religious symbols contributes to the protection and respect of individual autonomy and human dignity of the students by actually creating more space for freedom for those who within public schools want to criticize and transgress the narrow religious and cultural identity imposed on them by their families and narrow traditions; (b) citizens of a secular state *must* accept the shared, that is, public and secular identity if they want to be part of such a community, and this contributes to the maintenance and stability of the public order. The point of this conception of neutrality that follows from it, is to create a *neutral public space* free from the influence of religious belief, a ‘space’ that young people might occupy in order to constitute and reconstitute their ideas and values free from intimidating and conflictual manifestations of religious faith. But is this what this public ‘space’ achieves in the end or does it threaten cultural difference by either assimilating or completely neutralizing it? Is this a retreat for the liberal, democratic state and a serious inability to understand the challenges posed by both pluralism and multiculturalism? Let us turn to these two normative justifications. The first justification of the prohibition corresponds to a ‘perfectionist’ interpretation, and the second justification is based on a ‘libertarian’ interpretation of the principle of *laïcité* as neutrality in public sphere.⁸

IIa. The ‘perfectionist’ interpretation of *laïcité*

The ‘perfectionist’ argument that is implied by the first normative justification refers to the aim of emancipation and is mainly grounded on its respect and protection of individual autonomy as an intrinsic part of the ‘good’ (Raz 1986). Thus, autonomous choices are, as a matter of principle, tolerated, whereas non-autonomous ones are not. But such a view makes the unwarranted assumption that Islamic headscarves are *prima facie* symbols of young girls’ subordination and patriarchal tyranny. Nevertheless, this is only partly true, because many Muslim girls wear their headgear voluntarily. The issue then becomes one of how one distinguishes voluntary from non voluntary submission, and whether one respects such a voluntary submission, one that arguably might impair the possibility of the girls’

⁸ Similar categorizations are used by Anna Elisabetta Galeotti (2002: 115–136) and more recently by Cecile Laborde (Laborde 2005), who follows mainly R. Audi’s exposition in Audi 1989.

future free choices. The ‘perfectionist’ would clearly not consider such choices autonomously made, and therefore should not have to respect them.⁹ Moreover, this opens the path for a wider range of state interference. For example, why does the state’s ‘perfectionist’, arguably paternalistic, intervention not apply to other, comparably ambiguous, family decisions to transmit traditional values and beliefs, such as sending children to religious catechism? Where would the state’s judgment on what constitutes an autonomous choice have to stop?¹⁰

To be sure, this effort does not stand far from a politics of assimilation. Let us see how such an assimilation is justified, although assimilation and neutralization in the above sense can, under conditions, support each other.¹¹ This kind of French-republican laicity and neutrality, because it seems to justify the claim that the freedom to manifest one’s religion publicly potentially *violates* the freedom of others, because it allegedly functions as propaganda, proselytism or intimidation, postulates at the same time a conception of civic identity, the identity of the French citizen as a counter-system to religion. Having its roots in the 1789 Declaration of the Rights of Man and Citizen the French nation builders try to emancipate students by claiming that emancipation, and unity in the public realm are the outcome of the constitution of a national identity, the constitution of a homogeneous people [*peuple*]. Such an enterprise has to be carried out by the triadic ‘reason-science-progress’ (Morin 1990: 38, Laborde 2005: 315–316). Indeed, the principle of laicity became a way to forge unity in a diversified society.¹² This is an important point, because the French-republican conception of neutrality considers school as a separate space where the particularisms and factual constraints of life are suspended. But *laïcité* aims to emancipate children from the confines of their social backgrounds and to transform believers into true citizens. This presupposes that students are not treated as equal individuals and citizens who enjoy freedom of religious conscience and expression, but as individuals-in-the-making bereft of any cultural trace, and the school as the laboratory of the future. The school, under this conception of laicity, is exactly the institution whose purpose is to form them *and* establish unity in a diversified

⁹ J. S. Mill has made clear that a freedom to enslave oneself cannot be respected (Mill 1962). Arguably, this was one of the mistakes French feminism committed when defended the ban of religious symbols as an effort to emancipate young women; see, for example, A. Vigerie and A. Zelensky, ‘La’cardes, puisque féministes’, *Le Monde* 30/5/2003.

¹⁰ To be more precise here, I do not mean that it is illegitimate for perfectionists to be worried about the power relations *internal* to a specific group. W. Kymlicka clearly rejects internal restrictions infringing fundamental rights. What I object to is that autonomy can be enforced in such a way. Indeed, many non-Muslims tend to conformist ways of life, yet they should not be ‘forced to be free’.

¹¹ We are referring to the legitimacy of assimilation and not to political inclusion, which is exactly the real question we are supposed to answer here.

¹² Note here that in France the whole issue of headscarves was largely put in terms of what it means to be ‘French’ nowadays. However, the same issue arised lately in Britain around ‘Britishness’.

immigrant society.¹³ But this conception of *laïcité* might function exactly, as Rawls has acutely stated, as a ‘comprehensive doctrine’ that simply replaces in a crude way the old substantive view of the ‘good life’ defined by religion by a new vision of the ‘good’ defined secularly by reason and scientific progress creating another, although secular now, comprehensive doctrine (Rawls 1993: xviii, 175, also Taylor 1998). The school, as an extension of the public sphere, is transformed into secular catechism.

The ‘perfectionist’ argument presented here can be also stated in different, although quite similar to the preceding view terms: the law banning religious symbols is normatively justified in the name of the protection of human dignity. The normative justification of the French law can be depicted that way should one adopt an interpretation of the headscarf as an *a priori* symbol of women’s oppression. Through such an interpretation one can defend an *objective* violation of human dignity and discard the *subjective* criterion of its definition. This definition of human dignity takes us at the heart of the foundations of the system of rights. In the conflict between an objective and a subjective definition of an offence against human dignity the opposition is between an individualist, liberal conception of rights, which guarantees respect for self-determination and makes the individual the ultimate judge of her own dignity, and a communitarian conception, which makes community’s conception the objective criterion of an offence against human dignity. This second view places human dignity in opposition to freedom of conscience. It presents, in other words, human dignity not being possessed by the individual herself, but as translated into a legal obligation to respect one’s own freedom, and not exclusively other people’s freedom. Such a view opens the path for ‘objective’ (moral, philosophical, religious) conceptions of human dignity, which simply mask conceptions of human dignity formed by the majority. Nevertheless, rights are *subjective* and cannot be defined by democratic majority as they constitute exactly a guarantee protection against it.¹⁴ The liberal conception of rights argues that the offence has to be substantiated through the subject’s consent. In our case, if Muslim girls do not think that their wearing of the headscarves constitutes a violation of their human dignity it is not possible for the law to intervene. This does not mean that the rejection of perfectionism and its paternalistic flavor is simply the whole story here. Rights should refer to further non-subjective conditions of the possibility of their exercise. However, in the following section we shall see why non-interference just is not enough.

¹³ This is how the Debray Commission, established by the French National Assembly in the summer of 2003 for studying the affair of the headscarves and recommending state policy, justified its recommendation for a law that bans all religious symbols (Debray Report 2003, Vol. 1: 30). A detailed analysis of both the theory and politics of the French state can be found in Joppke 2007.

¹⁴ The effort to ‘objectively’ define human dignity leads to ‘legal moralism’; see the classic debate between H. L. A. Hart and Lord Devlin in Hart 1963.

IIIb. The ‘libertarian’ argument: neutrality as privatization of identity

A further consequence of the interpretation of *laïcité* as ‘combat neutrality’ is that the secular state demands that what is to be tolerated has to remain strictly private vis-à-vis a public sphere, where, on the contrary, the same rules apply to all. Here the institution of the private/public divide is of utmost importance, something not so straightforward in the ‘perfectionist’ argument, and the public education system is arguably included in such a public sphere, indeed it is an extension of it. What is now protected is a thinner conception of liberty (negative liberty), that is, one’s right to individual choices and preferences, which should not be violated. In this sense, differences are understood as being themselves reducible to differences between particular individuals. A neutral public space then is supposed to be ‘blind to differences’ exactly by trying to be anti-discriminatory in its treatment of citizens. Early modernity is to be blamed for that, which recognizes only a species identity, the identity proper to human species, but demands the definition of humanness (nature, substance, reason etc.) in terms of common traits. Following this approach the values of abstract/universal humanism were incorporated in the 1789 Declaration of the Rights of Man, which recognizes the same and equal rights to all.¹⁵

But now the problem becomes one of how to determine what counts as actually trespassing in the public sphere – a particularly thorny problem in the course of drawing the line between what constitutes a public, ostentatious manifestation and a neutral, discreet dress symbol! Notice here the inherent weaknesses of such a law in the case of the ban of all religious emblems in France. Such a law is first of all unable to determine *which* emblems go against the norm and second determine firmly *who* is constrained by the norm itself. In the first case it is extremely difficult for the law, which wants to pick up ‘ostensible manifestations’, to determine which article of clothing or hairstyle (or indeed beard) violates the norm. This would entail an effort to *determine the students’ intentions* on the basis of size, color and shape of clothing or style of appearance. Why is it a scarf and not a bandana, why is it a beard and not a moustache? This is clearly a major retreat in the liberal character of law.

Evaluating the case of the ban of religious symbols in public education we are faced with a paradox in the French-republican conception of culture. In principle, the creation of a neutral public sphere does not denote an ethical life, but constitutes the ‘bond’ between identity and administration. It is now a ‘neutral’ culture that unifies; a de-centered perspective based on a human rights discourse, ‘sensitive’ to difference and social equality. This means that cultural identities can in principle be preserved instead of being assimilated. Nevertheless, this does not escape cultural

¹⁵ For the problems such an abstract universalism focused on identity has caused to democratic citizenship see particularly Renault & Mesure 2002. Kant remains an exception to this as he sees subjectivity in a non-reductive to any empirical content way.

identity politics, for there is an inherent paradox here. On the one hand, one has to belong to such a group in order to participate in the public sphere,¹⁶ while on the other, as soon as cultural identity becomes the defining factor for participation, it becomes *depoliticized*. Cultural identity is *included* only to get *excluded* in terms of a neutral culture. This is a strategic move: it preserves cultural pluralism at the expense of making it politically irrelevant. There is a clear logic of inclusion/exclusion inscribed here. This is also the case with the Muslim girls. At a first level their identity is included, but only to be excluded, that is, 'neutralized' at a second level.

The argument coming from the French conception of the liberal state insists on the assumption that secular equality provides a public space for equal freedom whereas religious and cultural differences stay at the level of 'individual' life. Muslim girls are not refused the right to practice their religion in private. In that sense neutrality equals privatization of whatever religious beliefs people have – arguably, what is banned is not religious belief but its public manifestation. Difference becomes then, or, more strongly, *it should* become, a private issue (Barry 2001: 24–25). But this conception of the notion of neutrality in law bases its authority on a false conception of impartiality of reason. The state's role then is primarily a negative one: it should not force minority groups to conform to the dominant culture; law secures non-interference. Minorities then enjoy formal equality before the law, which means that they are not assimilated, but are left free to develop or disappear (Laborde 2005:308–309). Nevertheless, the partiality of such a conception has been pointed out by both liberals and non-liberals. It chiefly conforms to Christian, white males. Instead of being neutral and negative this conception forgets that there are neither neutral procedures, nor neutral values. Neutrality, should it possess a value, cannot but be based on non-neutral institutions (Young 1990:116). Therefore, it is unclear why only students in schools and not also parents entering these public places should be required to remove such 'ostensible' signs. In any case, it would be a contradiction in terms to have 'neutral' *marks* of 'identity'. In the end, only 'pure nakedness' or indeed 'pure abstraction' would probably succeed in fitting into this model. As we tried to argue above, this is a neutral public space in the sense of constituting an 'empty signifier', which needs to be filled in some way or another and potentially fosters an increasing intolerance, which favors a process of normalization driven by the dominance of the strongest group, in our case, a conception of what it means to be a 'proper' French citizen!¹⁷

The argument here might remind us of Marx's classic but controversial early essay on the problem of Jewish rights within European secular states (Marx 1975 [1843]).

¹⁶ Here, I have in mind the opposite case of the *sans papiers* in France.

¹⁷ For these objections see Bowen 2004; Bowen rightly says that these are no mere practical problems, but hide a growing intolerance, exactly the opposite of complete indifference, now not based on 'biological' inferiority but on a 'cultural' one; see Hardt and Negri 2000: 190–192.

Indeed, Marx insists that a declaration of freedom from ‘religious identity’, as in the dismissal of all religious symbols in the case of French *laïcité*, does *not* liberate the individual from the conditions constitutive or reiterative of such identity. To the contrary, it is only *in abstraction* from such conditions that the individual is claimed to have been ‘emancipated’ by the universal state; this is, according to him, a ‘devious emancipation’.¹⁸ Marx’s critique of the constitutional state as such – then the French and North American versions of constitutionalism – sees religion not as the basis but as the phenomenon of secular narrowness itself (Marx 1975 [1843]: 217). Marx argues that religion becomes just a non-political distinction that the state presupposes in order to exist!

To be sure, this might be a proof that ‘identity’ was the only means for modern democracies, taken as nation-states, to constitute themselves as communities. This is not the case anymore (Andersen 2003). Multicultural communities have to base the social ‘bond’ upon something else altogether. In the French-republican paradigm, as we reconstructed it, secular equality oscillates between a ‘particular’ privatized identity, and a public ‘universal’, and abstract one. A fierce criticism of such a conception has recently been put forward by M. Hardt and A. Negri (2000). The ‘paradox’ mentioned above is described now as comprised of three moments: one inclusive, another differential, and a third managerial. The first is the ‘libertarian’ moment: all are welcome within, regardless of race, creed, color, sexual orientation, and so forth. In its inclusionary, juridical moment it is ‘blind’ to differences. But in its cultural moment differences are celebrated! These differences are now cultural and contingent, rather than biological and essential. We say cultural and not political, exactly under the assumption that they are confined to private beliefs and will not create conflicts. Finally, the managerial moment controls what is mainly ‘neutralized’, which is the same as its being naturalized (Hardt and Negri 2000: 198–199). Consequently, the libertarian interpretation of *laïcité* argues that multiculturalism does not create differences, but takes what is given and works with it.

III. Religious symbols in Europe and the *European Convention of Human Rights*

The French case has been indeed the paradigmatic case among countries in the Europe. However, there are many interesting cases and different approaches in other countries such as Britain, Germany, Italy, the Netherlands and particularly Turkey. In most of them the approach is quite different from the French interpretation of the

¹⁸ Note that the ‘deviousness’ mentioned by Marx is not only a moral objection to hypocrisy, something that would confine his criticism within the liberal framework, but a critique of Hegelian dialectics of subreption [*Aufhebung*], liberation through a *medium*, which thinks that it can accommodate real movement and change within itself; see Marx 1975 [1843]: 218.

principle of *laïcité* as ‘combat neutrality’, and some of them adopt an interpretation of neutrality as even-handedness rather than strict separation. In Britain the situation is the opposite than the one in France. British courts have ensured that religion is accommodated in the public sphere, provided there is no threat to security or the proper function of institutions. Muslim headscarves and Sikh turbans have traditionally been allowed in the schoolroom.¹⁹ In Germany, for example, the German Constitutional Court in the *Teacher Headscarf* case upheld a Muslim teacher’s right to wear a headscarf in the classroom.²⁰ Germany conceives state neutrality as ‘open neutrality’ as opposed to French *laïcité* as ‘combat neutrality’. ‘Open neutrality’ means that the state sees its task as assuring that individuals can express and live out their religious convictions not only in private but also in public. Moreover, the state does not identify with any one religion, but all religions in society are treated in an even-handed and impartial way.²¹ Nevertheless, this might even have changed lately since in the spring of 2004 the city of Berlin passed legislation prohibiting all religious symbols. Furthermore, Italy’s strong ties to the Catholic church influence its cultural and legal approach, and although there is official separation of state and church, and symbols are permissible on school property and public offices, recently the highest court upheld the display of crucifixes in schools on the grounds that the crucifix is a symbol of the values at the foundation of Italian society. Finally, there is a typical ‘pillar’ tradition in the Netherlands, which has created self-organization of immigrant groups in closed communities. There are state-subsidized private schools on equal footing with public schools. This ‘pillar’ system, although liberal and tolerant of religious symbols, has caused enormous problems, indeed, a ‘tribalization’ of Dutch society (Maris 2007: 7–10).

The widespread nature of the religious symbols debate and the various political and cultural factors influencing interpretations of neutrality in France and other European countries, give rise to the question of how these national differences will shape the scope of freedom of religion within European human rights law at the regional level. Are contextual solutions important? However, there is already an emerging jurisprudence in a number of cases. In its judgments the ECtHR used both the principles of secularism and neutrality: ‘[...] the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the state, which are in harmony with the rule of law and respect for human rights and democracy’.²² The quotation is taken from a case

¹⁹ Following the 1983 case of *Mandla v. Powell*.

²⁰ *Ludin* Case no. 2BvR 1436/2002 and in the German Constitutional Court BverfG NJW.2003.3111.

²¹ See Joppke, 2007: 326–336; for a good presentation of the different approaches in most of the European countries, but also in Canada and the US, see particularly Barnett 2006.

²² *Refah Partisi (The Welfare Party) and others v. Turkey* (Grand Chamber Judgment), Strasbourg, Feb. 13, 2003.

involving the ban of a political party in Turkey, the *Refah* party. The party was at the time of the ban in government and was the largest one in the country. One of the main arguments was exactly that the party was threatening the principle of secularism enshrined by the Turkish Constitution, because it was allowing women to wear headscarves when entering public institutions. By upholding the ban of the Refah party the Court seemed to interpret the notion of neutrality in the closed, restricted way we analyzed above. Furthermore, in the *Dahlab* case²³ the ECtHR accepted Switzerland's arguments that a teacher's headscarf might both disturb the 'public order' or religious harmony of the school and also influence the pupils in a way that constituted a threat to their – and their parents' – rights according to the ECHR First Additional Protocol, art. 2. This was accepted although there had been no complaints from any child or parents. In this case and in the next one, the lack of emphasis on individual behavior or characteristics making the prohibitions reasonable in practice implies that the Court accepts a general ban on certain expressions of religious self-identification inside public institutions. Once more, the impression that the Strasbourg Court opts for a kind of 'closed neutrality' seems to be clear.

Yet, the most interesting example we have available is the recently adjudicated case of *Leyla Sahin v. Turkey* by the Grand Chamber of the European Court of Human Rights.²⁴ What makes this particular case interesting are the similarities it bears to the French case. In a similar to the French case line of justification the ECtHR held unanimously that there had been no violation of Sahin's freedom of thought, conscience, or religion under the ECHR Article 9 or other article. Article 9 para 1 protects freedom of thought, conscience and religion: '[...] this right includes freedom to change his religion or belief and freedom, either alone, or in community with others and in public or private, to *manifest* [emphasis mine] his religion or belief, in worship, teaching, practice and observance'. Para 2 permits certain restrictions on the basis of public safety, protection of public order, health or morals, or the protection of the rights and freedoms of others.

Quoting explicitly the French National Assembly's law of 2004, which banned 'visible' religious symbols in schools, it stated that the University of Istanbul's regulations, of which Sahin was a student, imposing restrictions on the wearing of headscarves were justified according to the Turkish constitutional principle of secularism, endorsing essentially the normative reasons given by the French state we analysed above. Furthermore, the court also applied the doctrine that the states have a 'margin of appreciation' when called to regulate religious and cultural difference in light of their traditions and best interest. It specifically stated that '[b]y reason

²³ *Dahlab v. Switzerland* (Application no. 42393/98), 15 Feb 2001.

²⁴ *Leyla Sahin v. Turkey* (Grand Chamber Judgment), Application no. 44774/1998, November 2005.

of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course'.²⁵ The questions that are raised here are mainly two: (a) is the ECtHR's treatment of religious symbols according to Article 9 of the ECHR prone to the same criticisms regarding the French interpretation of the principle of state neutrality? (b) is the appeal to the 'margin of appreciation' the right approach adopted by the court? In other words, does it represent the common European values of democracy and human rights and, in the end, what kind of diversity does it preserve?

(a) The *Sahin* case seems that it involves the same notion of neutrality we identified above as 'closed neutrality'. Moreover, what would be interesting here to stress is that, even according to the Court's own jurisprudence, both the French and Turkish laws might be responsible for 'indirect discrimination' against under art. 14 of the ECHR. Direct discrimination according to that occurs when states treat differently persons in analogous situations without providing an objective and reasonable justification. Indirect discrimination though occurs when states fail to treat differently persons whose situations are significantly different.²⁶ The EU Council also operates with such a notion which is defined in a way more suitable to our argument here. Indirect discrimination occurs when an 'apparently neutral provision, criterion or practice' would put persons at a particular disadvantage compared to other persons.²⁷ Drawn on our analysis of the French case, one realizes that the law, although 'neutral' on its face, affects first and foremost manifestations of Islamic identity. This is because the prohibition would not affect more 'discrete' as opposed to 'ostentatious' religious symbols. In the French case religious symbols like necklaces with little crosses on pupils and teachers pass the test. Hence what it is restricted is the rights of persons who by conviction want to wear 'visible' or 'ostentatious' symbols, while those whose religious, or perhaps non-religious, convictions require them to carry only 'discrete' signs or no signs at all are not therefore affected at all.²⁸

(b) In challenging the majority's delegation of decision-making authority to the member states the only dissenting judge in the *Sahin* case called into question the 'margin of appreciation' approach used by the majority. First, the majority claimed that the diversity of practice between member states on the issue of regulating the wearing of religious symbols in educational institutions showed that there was no

²⁵ *Sahin* 2005, para. 121; also Skach, 2006: 188.

²⁶ In this way the Court extended further the notion of 'direct discrimination' in *Thlimmenos v. Greece* 6. 4. 2001.

²⁷ EU Council Directive 2000/78/EC.

²⁸ It is true that within contemporary liberalism there is disagreement on the best way to satisfy the principle of non-discrimination, that is, whether it is best to disregard differences or to take them into account so as to counter the different value that is *socially* attached. We will argue for the latter case.

European consensus and that national authorities are better placed to strike a balance. Nevertheless, first of all, this claim was not really true, because apart from France and Turkey no other contracting state had bans in place on religious symbols at the level of public education. But the appeal to consensus raises further problems: does the Court refer to past or current consensus, and does the Court need to wait until contracting states reach such a consensus over time? This approach is surely relativistic regarding human rights, and seriously undermines the *Schuman Declaration* on common values. Second, the most important objection was that, despite the court's choice to use the margin of appreciation, it was essentially ignoring its obligation to provide the necessary 'European supervision' on such matters. The dissenting judge insisted that the issue was not merely a local one, but one of importance to all member states. European supervision could not, therefore, be escaped simply by invoking the margin of appreciation, as the ECtHR has the task to protect human rights on a *subsidiary* basis.²⁹ What the Court had to do in such a case was to give judgment on the issue of whether collective interests, such as the maintenance of public order, morals – what constitute the 'limitation clauses' in art. 9 para 2 of the ECHR – are violations of freedom of religion and its manifestation. This is indeed an important legal issue, yet it is also an essential aspect of political morality here.³⁰

The force of the 'limitation clauses' like the maintenance and preservation of 'public order' makes sense only within a theory that treats both rights and collective goals as protecting interests. A sufficient quantity then of some particular common interests, 'security' for example, could outweigh interests protected by human rights, as in versions of utilitarianism and other interest-based theories of rights. However, this is not how rights should be viewed. People have rights to specific liberties (religion, expression) and cannot be deprived of them on an inegalitarian basis, such as that their conception of the good life is simply inferior. To be sure, it is absolutely impossible to establish the case that religious symbols *as such* potentially threaten public order, and morals. Oddly, in the *Sahin* case the Court held that secularism must take precedence over freedom of religion. The only way for this particular argument to make sense is that the principle of secularism is perceived as a significant broadening of the 'public order' justification. As such, public order is interpreted as extending to the point where it encompasses deeply held cultural values of secularism in the public sphere, something that undermines any prospect of common values. The focus of rights though should be to guarantee that a political community treats their members *as equals*. It is equality not common cultural identity that unifies. To this fundamental demand of political morality we finally turn now.

²⁹ *Sahin* 2005, dissent, para. 3.

³⁰ For an illuminating take on the different conceptions of the margin of appreciation and more generally on the interpretation of the 'limitation clauses' in the ECHR see especially Letsas 2007: 80–98, 117–119.

IV. Neutrality as equality: the task of instituting a European public sphere

The ECtHR has also expressed its dedication to the principle of neutrality and its relationship to other values: '[t]he Court has frequently emphasized the State's role as the *neutral* and *impartial* organizer [emphasis mine] of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society'.³¹ How should we interpret then this principle? Interpreted through the ambiguous conception of French style *laïcité* neutrality is difference-blind and abstentionist regardless of race, colour, and faith. But, according to our argument, it should *not* have the meaning of secularization, that is, a strict separation between state and religion. The consequences of such a misinterpretation were identified above as involving outmoded efforts to integrate difference through creating unity by employing another, non-religious, comprehensive doctrine. Therefore, these efforts violate the very essence of neutrality towards conceptions of the 'good' life. Such a misinterpretation also rests on a false separation of public and private. A neutral state should not privatize religious and cultural identity. What it should protect though is that, whatever process of decision is being made by the individual regarding this identity, must not be a process that is forced or a product of social engineering. Privatization completely neutralizes difference and makes it being exactly non-political by imprisoning it, making people of religious and cultural minorities feeling shame and inferiority not only as individuals but also as members of certain groups that are stigmatized (Galeotti 2002). This approach represents a conception of 'closed neutrality', indeed a kind of 'fundamentalist secularism' that corresponds to an instrumental conception of public sphere.

At its core, freedom of religion encompasses both a negative dimension – no one can be forced, directly or indirectly, to recognize a particular religion or to act contrary to what he or she believes – and a positive dimension – freedom to believe and to manifest one's own religion. Religion is indeed a matter of personal conscience (*forum internum*), yet conscience remains opaque even to ourselves should it not have the absolutely crucial chance to manifest itself in public, that is, to express itself and therefore be *realized* in the world. Without public manifestation private space becomes then only a fortress.³² If freedom of conscience and expression are tightly connected publicity cannot be an external to the individual framework,

³¹ *Refah Partisi v. Turkey*, op. cit., referring to several other judgments where the statement is made.

³² Kant defends such a thesis in his famous essay *An Answer to the Question: What is Enlightenment?* It has been pointed out that Kant does not use the term 'private' as synonymous with individual perspective, or to refer to the merely personal; see Auxter 1981: 306. Auxter uses 'private' to mean that which falls short of the complete development of human capacities.

but becomes *constitutive* of subjectivity having a non instrumental value. Neutrality must be then no longer an alternative system to religion, but rather a regulating principle for the pluralism of both religious and nonreligious (philosophical, ethical) convictions existing in civil society. Freedom of conscience and manifestation becomes then part of individual self-determination and is being translated *both* into a right to difference *and* a right to belong in a certain religious group, community (identity). This interpretation of freedom of conscience and its relation to manifestation is explicitly adopted by art. 9 of the ECHR as mentioned above, which closely links freedom of conscience and manifestation. Clearly this is an approach essentially different from a Lockean in spirit liberalism.

Such a different approach interprets now laicity and neutrality not as strict separation, but as equality, that is equal treatment of both religious and non-religious doctrines. Rights, like freedom of religion and its manifestation are important for our status as free and equal citizens who are responsible for choosing and pursuing our own conception of the good life. In our case, the state must in principle accept publicly visible manifestations of religion, and its ritual expressions in public space. Religion should not be relegated to the private sphere because expression is inherently social due to its crucial characteristic that it *engages* difference by opening it up to communication, be it either rational or of another, symbolic nature. Liberal neutrality through constitutionalism should manage to emancipate not only from religion, but also from any homogenizing force, including the nation-state. An effective process of emancipation cannot be based on a prohibition, but on open expression and manifestation of religious or non-religious beliefs.

However, this particular form of neutrality pertains to the *consequences* of state action, and not only to aim and justification: whatever the state does, the interests of all affected parties ought to be affected in the same way. This form of neutrality corresponds not to formal, but to real equality, which entails positive action on behalf of the state and might include policies of affirmative action (Laborde 2005:328–329).³³ Modern state should not have a negative role (protection and preservation of the *forum internum*) but also a positive role in providing the public space suitable for the subjectivity's responsible expression and development. It is important

³³ Neutrality and equality are intimately connected especially in R. Dworkin's theory of rights. Dworkin argues that a government treats people as equals only if it is neutral towards their conception of the good life. Nevertheless, one has to dig deeper in relation to their interconnection. Accordingly, neutrality of effect is rejected by Rawls because, as he argues, it is virtually impossible for the basic structure not to have influences as to which comprehensive doctrines endure and gain adherents over time (Rawls 1993: 193). I think this approach is misguided as endurance of a religion or culture should not be based on the Darwinian law of the survival of the fittest, but on the free development of human potential, and imprisonment to the private does not constitute such a free development. Unfortunately, further discussion of this version of state neutrality is beyond the scope of this article.

to note here that, according to the conception of neutrality as equality, the school institution should not be an extra-societal refuge, but a mirror of society's pluralism, with the mandate to prepare students for what they will encounter in society.³⁴ In the end, pluralism only makes sense when it is recognized in the public sphere and becomes toothless when confined into the private.

The interpretations of neutrality described above are indeed in opposition to what is nowadays being put forward as multicultural recognition (Taylor 1992, Kymlicka 1995), and the latter has been extremely helpful in making us realize the drawbacks of certain misconceptions of neutrality. Yet, the link of freedom of conscience with its manifestation in public cuts across the private/public distinction and does not make the interpretation of neutrality reductively individualistic.³⁵ Furthermore, the opposition to neutrality as equality is not so clear. Among other things, multicultural recognition works differently for different groups, and multiculturalism is often conceived as differentiated rules for different ethical identities.³⁶ Yet, this is not incompatible with a conception of justice that treats similar cases in a similar way and different cases differently. A theory of rights cannot be blind to differences. Blindness towards differences disappears though as soon as we realize that the bearers of subjective rights constitute themselves *intersubjectively*. This is absolutely crucial as the public manifestation of one's religion should also lead to the public use of one's reason. Such a thing is an exercise of *public*, not just private, *autonomy*. Subjective rights that protect autonomous life cannot in the end be articulated properly if subjects themselves cannot manifest in full range, that is, publicly as embodied persons, their views about the effects of policies on them. Exercising public autonomy helps citizens creating representations of and realize their true and legitimate interests. Private autonomy is guaranteed only by the exercise of our autonomy in the public sphere.

Consequently, the contemporary problem of the treatment of religious symbols in European countries teaches us a bitter lesson about the fragility of our democracies. A politics of the bogus neutrality we described throughout the presentation enforces feelings of powerlessness and exclusion even *within* an inclusionary democratic logic. We have then the 'paradox', akin to the 'paradox' of the French-republican conception of culture, according to which one claims to defend young girls against

³⁴ However, we should draw attention here to the fact that, for example, the removal of the crucifix from classrooms in order not to intimidate non-religious or non-Christian students would be entirely legitimate as a state policy as it involves the school as an institution and not the students themselves. A public institution protects and fosters people's freedom not the other way around. See the *Dahlab v. Switzerland* decision, op. cit., for an example of this point.

³⁵ As communitarians and multiculturalists alike assume it is.

³⁶ The important issue whether this entails recognition of collective rights in addition to individual rights has to be left open here, although to argue for collective rights seems to me highly controversial.

religious fundamentalism, of which sexism is an intrinsic part, by banishing them from school, i.e. making them personally – in their lives, their futures, their flesh – bear the penalty for the injustice of which they are the ‘victims’, and sending them back to the communitarian space dominated by precisely this religious sexism (Balibar 2004: 354). This move opposes a fundamentalist secularism to religious fundamentalism, undermining in the end any prospect for the emergence of a European public sphere. If *domination* comes from *both* ‘public’ and ‘private’, then it is surely natural for them to take the part of their most familiar space. In that sense, religious fundamentalism might indeed be not a pre-modern, but a post-modern state challenge (Bhabha 1990; Hardt and Negri 2000: 147–150).

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